

TDI Yearly 2023: Key developments in the EU's trade defence policy of the year 2023

Commission TDI Practice 2023



**New trends in
anti-circumvention
investigations**

A. Extensive application of Article 13(2) BADR

Article 13(1) BADR / Article 23(3) BASR

Circumvention shall be defined as a change in the pattern of trade [...] which stems from a practice, process or work for which there is insufficient due cause or economic justification other than the imposition of the duty including, *inter alia*:

- (a) the slight modification of the product concerned to make it fall under customs codes not subject to the measures, provided that the modification does not alter its essential characteristics;
- (b) the consignment of the product subject to measures via third countries;
- (c) the reorganisation of the channels of sales in the country subject to measures in order to export the product subject to measures through producers benefiting from an individual duty lower than the duty that would be normally applicable;
- (d) the assembly of parts in the Union or a third country (BADR only)**

Article 13(2) BADR:

An assembly operation in the Union or a third country shall be considered to circumvent the measures in force where [...] the parts constitute 60 % or more of the total value of the parts of the assembled product, except that in no case shall circumvention be considered to be taking place where the value added to the parts brought in, during the assembly or completion operation, is greater than 25 % of the manufacturing cost [...]

A. Extensive application of Article 13(2) BADR

- What about the like or slightly modified products which are **manufactured (but not assembled)** in third countries, using inputs originating from the country subject to measures?
- Application of Article 13(2). Concept of **assembly operations** interpreted extensively as to cover any **processing operations** through which the product concerned can be obtained, even if there is no assembly:
 - *Coils vs Slabs (SSHR and SSCR from Indonesia)*
 - *Foil vs Coil (AHF from China)*
 - *Glass fiber fabrics vs glass fiber rovings (GFF from Egypt, China)*
- What about CVD duties? There is **no equivalent provision** like Article 13(2) BARD in the BASR
 - *R798 (ongoing) >> SSCR (Indonesia)*
 - *R756 >> GFF (Egypt, China)*

- **Legal basis:** Article 13(1) 4th subpara. // Article 23(3):
 - *The practice, process or work referred to in the third subparagraph includes, **inter alia** [...]*
 - **“Unlimited” Commission’s discretion?**
- Any processing operation with relatively low added value (less than 25%) may amount to circumvention **just because** the input used originates in the country subject to measures?
- Conflict with **non-preferential rules of origin** (concept of last substantial transformation)

B. Customs (OLAF) investigations in parallel with AC investigations

	Anti-circumvention investigations	Customs/OLAF investigations
Legal Basis	Article 13 (Regulation 2016/1036) Article 23 (Regulation 2016/1037)	Article 60 of the Union Customs Code (UCC) Articles 32-33 of the UCC Delegated Regulation (UCC-DR)
Objective	Extending existing AD/CVD duties to imports consigned from a third country, irrespective of the origin	Re-assessment of the non-preferential origin of past imports
Definition	Article 13(1) BADR / Article 23(3) BASR: Change in the pattern of trade [...] which stems from a practice, process or work for which there is <u>insufficient due cause or economic justification other than the imposition of the duty</u> where there is evidence of injury [...] and where there is evidence of dumping [...]	Article 60(2) of the UCC: Goods [...] shall be deemed to originate in the country or territory where they underwent their last, substantial, economically-justified processing or working , in an undertaking equipped for that purpose, resulting in the manufacture of a new product or representing an important stage of manufacture.
“Objective” criterion	An assembly operation [...] circumvents the measures if: - the parts from the country subject to measures constitute 60% or more of the total value of the parts, except if - the value added is greater than 25 % of the manufacturing cost	Last substantial transformation: - Article 32 and Annex 22-01 of the UCC-DR - Commission’s list rules
“Subjective” criterion	Article 13(1) BADR / Article 23(3) BASR: “a practice, process or work for which <u>there is insufficient due cause or economic justification other than the imposition of the duty</u> (...)”	Article 33 of the UCC-DR: “Any processing or working operation carried out in another country or territory shall be deemed not to be economically justified if it is established on the basis of the available facts that the purpose of that operation was to avoid the application of the measures referred to in Article 59 of the Code.”
Effects	Prospective: extension of the measures takes effect from the date of registration of imports (Article 14(5) BADR, Article 24(5) BASR)	Retroactive: up to 3 years prior to the date of customs clearance (Article 103(1) UCC) (up to 5 -10 years in case of criminal offences)

B. Customs (OLAF) investigations in parallel with AC investigations

- Assessment is based on **different rules** (60% and 25% rule vs. last substantial transformation) however in both cases there is a “subjective” criterion involved, i.e. **economic justification**
- In this regard, customs authorities (and OLAF) rely on the conclusions reached by the Commission (in a different context) for the purpose of applying the rules of origin. However:
 - pursuant to Article 13(2) BADR, the economic justification criterion is “absorbed” by the 25% rule (**safety net**), under Article 33 of the UCC-DR the economic justification can always be questioned even if the “last substantial transformation” criterion is satisfied (**NO safety net**)
 - anti-circumvention regulations are **prospective**, customs investigations are **retroactive**
- Consequences for importers can be devastating:
 - The assessment of the non-preferential origin becomes highly speculative
 - Financial consequences: duties can be collected retroactively (up to 10 years)
 - Criminal consequences: duty evasion can be a **crime**
- Serious concerns regarding the right of defence when OLAF is involved:
 - OLAF investigations (and reports) are not publicly available
 - importers (and exporters) cannot directly contest OLAF’s findings
 - customs authorities rarely depart from OLAF’s reports >> *de facto* binding



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